

STATE OF ALASKA (ELLIOT R. LIND)

IBLA 85-685

Decided February 4, 1987

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing State of Alaska protest and approving Native allotment application AA-5998, parcel B, of Elliot R. Lind.

Affirmed.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Contests and Protests: Generally -- Rules of Practice: Protests

A State protest against approval of a Native allotment application fails to state with sufficient specificity the facts upon which conclusions concerning public access are made so as to conform to provision of 43 U.S.C. § 1634(a)(5)(B) (1982), where the protest recites that the applied-for land is the site of an existing seaplane base, boat launch, and trail, when it appears none of the claimed improvements are located on the allotment. Since the State's protest does not describe the land claimed by the Native allotment applicant with specificity under such a circumstance, the allotment may be granted to the Native applicant, all else being regular.

2. Alaska: Native Allotments -- Alaska Native Claims Settlement Act: Easements: Access -- Contests and Protests: Generally -- Rules of Practice: Protests

There is no authority for the reservation of easements in Native allotments comparable to sec. 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1982), governing reservations of easements in conveyances to Native corporations. An easement across Native corporation lands recognized pursuant to ANCSA may not constitute sufficient grounds for protest of a Native allotment under sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), where the record discloses the route of access reserved in the easement does not cross or about the Native allotment parcel.

APPEARANCES: Lance B. Nelson, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska, for appellant State of Alaska; Kimberly Hueter, Esq., Anchorage, Alaska, for appellee Elliot R. Lind; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Department of the Interior, for appellee Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On May 6, 1985, the Alaska State Office, Bureau of Land Management (BLM), approved the Native allotment application submitted by Elliot R. Lind, No. AA-5998, parcel B, and dismissed a protest by the State of Alaska against issuance of Lind's allotment which alleged the public use of Lind's allotment for a seaplane base, boat launch, and trail. The State protest was made pursuant to section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5)(B) (1982). BLM's decision dismissed the State's protest because it "fails to provide the specific facts upon which the conclusions concerning access are based" (Decision dated May 6, 1985, at 2). On appeal to this Board, the State contends BLM erred because the State's protest was sufficient to show the allotment application was given "individual consideration" by the State in formulating the protest (Statement of Reasons at 7).

The Board rejects this analysis of the statutory standard imposed by ANILCA on the State and affirms the BLM decision of May 6, 1985, which rejected the State protest. The Board also affirms the BLM decision to approve Lind's application, for the reason that the application apparently meets all the requirements of section 905(a)(1) of ANILCA.

Lind's allotment application was filed with BLM on July 20, 1970. In his application, Lind claims he has used the land since 1965, and that there is a cabin on the land. A field examination in 1973 confirmed the existence of the cabin, although the examiner concluded that there had not been substantial use to the potential exclusion of others of the allotment as claimed by Lind (Land Report dated June 11, 1973, at 3).

The State protest, which was filed with BLM on June 1, 1981, consists of two pages, the first of which is in the form of a checklist, on which possible land uses are available for selection. In the case of the Lind allotment, the State indicated the land was used for an "existing seaplane base," an "existing boat launch," and an "existing trail," and that "the land forms the only reasonable access to publicly-owned resources" (Protest at 1). A report of a field examination of the tract made on May 28, 1973, upon which the State relies in support of its protest, however, had revealed no such uses present at the 1973 visit to the Lind allotment by the BLM examiners. The only improvements reported on the land were two cabins constructed by the Lind family. The 1973 Land Report does, however, find that the Lind allotment has potential for use as a seaplane base and boat launch site, and recommends reservation of easements for such uses.

A memorandum to the file dated March 13, 1985, indicates that a review of the file was made to confirm the claimed presence of the seaplane base, boat launch, trail, and transportation corridor described in the State protest, but tended to show that none of the claimed uses were present on the

land. The BLM office examiner noted in the file that she "checked with photogrammetry February 11, 1985. Pictures do not show evidence of any seaplane base, boat launch, or trail. Photogrammetry info-roll #3275, frame 6184, photos - August 1983 Scale: 1:60,000." Finally, the State, in the statement of reasons filed with this Board on August 8, 1985, concedes that the Lind protest was one of 6,000 protests filed by the State on June 1, 1981, and argues that the high volume of work required for such an effort made it impossible to devote much time to any individual protest (Statement of Reasons at 9). The State seeks to excuse inaccuracies in the protest on the theory that not much use is actually made of the protest by BLM when the determination is made concerning the merits of any individual allotment claim, and that the protest should be treated as valid despite its inaccuracies and because it indicates a public necessity for a trail easement and 1-acre campsite at the allotment location (Statement of Reasons at 3). The State explains that it wishes to connect the Alaska Peninsula National Wildlife Refuge with Black Lake by a trail easement (EIN 20b) running north from the lakeshore towards the refuge through sec. 5, T. 43 S., R. 61 W., Seward Meridian, which crosses the Lind allotment (Statement of Reasons at 4). Since the State now argues that it desires to use the Lind tract prospectively for a campsite and trail easement to reach the refuge lying to the north of Black Lake, the State effectively admits the seaplane base, boat launch, and trail described by its protest do not presently exist, despite the claim in the written protest that all three improvements were "existing."

Page two of the State's protest (referred to on page one of the protest as "public use documentation,") is a description of the trail easement which the State says conflicts with Lind's allotment. Actually, two trails are described. One is near the ocean, at some distance from the Lind allotment. The other begins at Chignik and ends at sec. 5, T. 43 S., R. 61 W., near or at the location on Black Lake, which is inland from Bristol Bay on the Alaska Peninsula. The Lind allotment is also, of course, in sec. 5. The protest description runs:

Public trail easement from mouth of parallel Creek, paralleling and inland from the ocean shore and ending in Sec. 6, T43S, R57W, SM. Public trail easement to start in Chignik in Sec. 7, T45S, R58W, and heading wester [sic] along the ocean shore, crossing the lower Chignik River in Sec. 25, T45S, R61W, SM, following the northeasterly shore line of Chignik Lake, on the east side of upper Chignik River, to the east of Black Lake and ending in Sec. 5, T43S, R61W, SM.

(Protest at 2). This (second described) trail easement is not, however, easement 20b which is mentioned by the statement of reasons, for that trail begins at Black Lake and runs northerly towards the wildlife refuge. The trail described in the State's protest comes from the south and runs along the lakeshore towards sec. 5 and Lind's allotment. This trail is apparently an extension of the same trail which is numbered EIN 1 D9 in interim conveyance No. 93 issued May 22, 1978, by BLM to Chignik River Limited, and which appears as exhibit 7 to the State's statement of reasons. As reserved by the interim conveyance, this trail easement "runs * * * along the left bank of the Chignik River from Black Lake in T. 43 S., R. 61 W., Seward

Meridian, south to Chignik Lake in T. 45 S., R. 62 W., Seward Meridian" (Exh. 7 at 7). Since the Chignik River leaves Black Lake at a point about 5 miles south of Lind's allotment, it is clear that trail easement EIN 1 D9 was not extended along the shoreline of Black Lake to Lind's allotment in sec. 5 in the manner described by the State's protest. Otherwise stated, the trail easement described by the public use documentation filed by the State in 1981 is not the same easement for which the State now argues in its statement of reasons filed with this Board in 1985.

Lind points out in answer to the statement of reasons that the "public use documentation" which forms the second page of the State protest, was prepared for submission to the Joint Federal-State Land Use Planning Commission created by section 17 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1616(b) (1976). The document describes easements proposed to the commission by the Alaska Department of Fish and Game, and, as shown by attachment 3 to Lind's answer, this "public use documentation" was intended as a proposal for an easement made pursuant to section 17(b) of ANCSA.

The easements which the State now contends are entitled to displace the Lind allotment claim, therefore, are EIN 20b, a trail easement, and EIN 20a, a campsite easement, both of which are mentioned by BLM's interim conveyance No. 99, issued June 15, 1978, to Chignik River Limited, which appears as exhibit 8 to the State's statement of reasons. The campsite is described as:

A site easement upland of the ordinary high water mark on the northeast corner of Black Lake in Sec. 5, T. 43 S., R. 61 W., Seward Meridian. The site is one (1) acre in size with an additional twenty-five (25) foot wide easement on the bed of the lake along the entire waterfront of the site.

(Exhibit 8 at 2, 3). This description is reminiscent of the 1973 Land Report recommendation that there be a reservation for public access along the lake front at the Lind allotment. It has, however, no referent in the 1981 State protest. Like the trail easement, it appears to be derived from a proposed easement offered to the Land Use Commission rather than an existing claim of public use.

The trail easement, EIN 20b, was also reserved by interim conveyance No. 99, running "northeasterly to public lands in Sec. 33, T. 42 S., R. 61 W., Seward Meridian" (Exhibit 8 at 3). Also significant to this appeal, interim conveyance No. 99 excepted the entire Lind allotment as claimed from conveyance to the Native corporation. See Exhibit 8 at 1.

[1] Section 905 of ANILCA provides that all Native allotment applications pending before the Department on or before December 18, 1971, were approved unless, among other reasons listed in the Act, a protest by the State against the allotment were timely filed. The statute requires, however, that the State's protest must state with "specificity" the facts upon which the conclusions concerning access stated by the protest are derived. 43 U.S.C. § 1634(a)(5)(B) (1982). Here, BLM determined that the protest filed against Lind's allotment did not meet the statutory standard. Obviously, it is now apparent that the seaplane base, boat launch, and existing trail described by the 1981 protest are not, in fact, located upon the

land in sec. 5, and have never existed there. It may be, as was suggested in United States v. Napouk, 61 IBLA 316 (1982), that the improvements listed in the State's protest describe improvements on another tract of land in the vicinity. It is now apparent, however, that there are significant discrepancies between the Lind allotment and the tract described in the protest. The State argues, nonetheless, that there is enough similarity between the substance of the 1981 protest and the two access easements which it now seeks to impress upon the Lind allotment so that it should be found to have minimally complied with the statutory requirement that it state facts sufficient to identify the public access which it claims.

However, the Board cannot find that there is any legal foundation laid by the 1981 protest which would permit the State to amend its protest so as to substitute a 1-acre campsite for the boat and plane base said to be in existence upon the Lind allotment. Nor is it possible to substitute for the proposed trail described in the protest which ran south from Lind's allotment on Black Lake to Chignik Lake the proposed northeasterly trending trail now claimed. To do as the State urges in its appeal would be to substitute for the easements claimed in the 1981 protest two proposed easements which are based upon a State recommendation made to the Land Use Planning Commission created by section 17 of ANCSA, 43 U.S.C. § 1616(b) (1976). As to those two easements, EIN 20(a) and (b), there was an action taken in 1978 which is no longer susceptible to review by this Board.

[2] It is apparent that the easements which the State now seeks to impress upon Lind's allotment are not the prior existing uses which it described in its 1981 protest, but are in fact section 17(b) proposals made by the State to the Land Use Commission. It also appears that in 1978, BLM issued an interim conveyance of the land over which part of these easements were to be extended. When it did so, however, it also excepted Lind's allotment from the conveyance. As Lind points out, ANCSA does not contain any language authorizing the reservation of proposed section 17(b) easements, such as EIN 20a and 20b, from Native allotments. Pursuant to 43 U.S.C. § 1616(b) (1976) the Secretary was authorized to reserve easements only across Native corporation lands, and only to the extent the easements were necessary for access. See Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977). ANCSA did not authorize the reservation of such easements across Native allotments, and where such easements cross a Native allotment alternative routing must be found. State of Alaska, 74 IBLA 275 (1983).

It seems clear that no effort was made in the 1978 conveyance to ensure that easements EIN 20a and 20b, did not conflict with the Lind allotment. It is obvious that neither the State nor BLM considered that the 1978 conveyance, which also excepted the Lind allotment, had created a conflict between the allotment and the two easements which now form the basis for the protest against Lind's claim. As a consequence of this apparent oversight, however, the proper remedy for the State would have been to protest interim conveyance No. 98 in 1978 so that the easements could be relocated to eliminate any conflict with the Lind allotment. See State of Alaska, supra at 279. Now, therefore, it is concluded that BLM properly dismissed the State's protest,

since the protest failed to describe with specificity the basis in fact upon which the protest was made. 1/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Gail M. Frazier
Administrative Judge

1/ For a case in which this Board found sufficient basis in fact for the State's protest see State of Alaska, 95 IBLA 196 (1987).

